IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 77 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MITESH ROLLING MILLS P LTD

Versus

COMMISSIONER OF INCOME TAX

Appearance:

1. INCOME TAX REFERENCE No. 77 of 1987
MR JP SHAH for Petitioner No. 1
MR AKIL KURESHI WITH MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE D.A.MEHTA

Date of decision: 06/09/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In this reference at the instance of the

assessee, the following questions have been referred for our opinion in respect of assessment year 1981-82 :-

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that in an assessment under section 144 the assessee need not be given an opportunity of being heard by the Income-tax Officer ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in upholding the addition of cash credits of Rs.1,81,451?"

2. The facts leading to filing of this reference, briefly stated, are as under :-

The Income Tax Officer framed the assessment under Section 144 of the Income Tax Act, 1961 (hereinafter referred to as `the Act') on a total income of Rs.2,50,127/-. The return of income was filed on 29.6.1981 declaring total income at Nil. Another return also declaring total income at Nil was filed on 22.1.1982, as the date of verification in the first return was not written correctly. A notice under Section 143(2) was issued to the assessee in November, 1983, but none appeared for the assessee in response to that notice or even in response to the subsequent notice. A telegram was received from the assessee requesting for hearing with certain other cases. The Assessing Officer sent a letter fixing the next date of hearing. When the Chartered Accountant for the assessee appeared, details regarding shareholdings and details regarding unsecured loans obtained by the assessee Company were called for. On the next date, no one appeared. Hence, the Assessing Officer sent a notice under Section 142(1) calling for all the above details. Inspite of the opportunity given, the assessee did not appear nor sent the particulars. Hence, the Assessing Officer proceeded to make the assessment to the best of his judgment under Section 144 of the Act. The Assessing Officer made the following observations in the order :-

"The income under the head business is returned at Nil since the assessee does not seem to have commenced production as yet. However the balance - sheet reveals that there has been introduction in the form of Rs.90,000/- worth for shares

issued and Rs.1,60,127/- in the form of unsecured loans. The notice u/s. 142(1) issued to the assessee specifically asked for the identity of the persons in whose names these moneys to the assessee. The failure on the part of the assessee not only to each notice issued to him as also failure to furnish the information called for leads me to the inescapable conclusion that the assessee does not have any explanation to offer regarding these credits in his books. These amounts are therefore treated his income from undisclosed sources. Penalty proceedings u/s. 271(1)(2), 271(1)(b) and 271(1)(c) are hereby initiated.

With these remarks total income is computed as follows :

Net Profit as per P & L A/c. Rs. Nil

Add : Income from undisclosed sources Rs.90,000/- + 1,60,127/- Rs. 2,50,127

Total Income Rs. 2,50,127

Assessed u/s. 144. Issue DN & Challan.

Charged interest u/s. 139(8) / 217."

Thereafter the assessee moved an application under Section 146 of the Act, which was rejected by the Income-tax Officer and the said order was confirmed by the Commissioner (Appeals). The assessee also preferred an appeal against the order of the Income-tax Officer under Section 144 of the Act. On the dates fixed for hearing of the appeal also, nobody attended and on that day, a letter was sent requesting for adjournment on the plea that Director of the assessee Company Mr Niranjan was sick. Hence, another opportunity was also given. At the appellate stage, the assessee produced some papers purporting to be confirmation letters from the creditors of unsecured loans and the shareholders whose particulars were sought for by the Assessing Officer in the course of the assessment proceedings. The CIT (Appeals), however, found that no explanation was offered for submitting the additional evidence at the appellate stage and further the documents were not admissible unless they were proved. The Commissioner (Appeals) thereupon sent letters dated 2.1.1985 and 20.2.1985 giving opportunities

to the assessee to appear and present its case.

After hearing both the parties, the Commissioner (Appeals) modified the original assessment and instead of addition of Rs.2,50,127/- made by the Income-tax Officer in the original assessment, the CIT (Appeals) confirmed the addition only to the extent of Rs.1,81,451/-.

Aggrieved by the above order of the CIT (Appeals), both the revenue as well as the assessee went in appeal before the Tribunal. After hearing the parties, the Tribunal dismissed both the appeals and upheld the order of the CIT (Appeals). The Tribunal held that reasonable opportunity of hearing was given before the Income-tax Officer framed the assessment under Section 144 of the Act. On merits, the Tribunal held that the present case was covered by the provisions of Section 68 of the Act and that the case of K.S. Kannan Kunhi vs. CIT, 72 ITR 757 was not applicable as that was a case under the Income-tax Act, 1922.

At the instance of the assessee, the present reference is made.

3. At the hearing of this reference, Mr JP Shah, learned counsel for the applicant-assessee has stated that the assessee is a Private Limited Company and its main Director Mr Niranjan had suffered a paralytic stroke and had not recovered from it during the period when assessment proceedings were going on, in view of the opportunities given by the Income-tax Officer, he is not in a position to contend that the assessee was not given an opportunity of being heard by the Income-tax Officer before making the assessment under Section 144 of the Act.

4. Coming to question No. 2, Mr Shah has vehemently submitted that the Tribunal held against the assessee only on the ground that the case was covered by the provisions of Section 68 of the Act and that the decisions relied upon on behalf of the assessee were in respect of the legal position as applicable under the Income-tax Act, 1922. Mr Shah has contended that since the Tribunal proceeded on the footing that the moment the Income-tax Officer found that all the cash credit entries were not satisfactorily explained, such amounts had to be treated as income under Section 68 of the Act was not the correct approach in law as Section 68 uses the expression "may" in place of "shall" which term was used in the draft Bill to confer a discretion on the Income-tax Officer in the matter of treating the unexplained cash

credit amounts as the income of the assessee. In support of the said contention, Mr Shah has placed reliance on the decision of the Apex Court in CIT vs. Smt. P.K. Noorjahan, (1999) 237 ITR 570 which was concerned with Section 69 of the Income-tax Act, 1961. Mr Shah read out the order of the Tribunal dealing with this particular question and submitted that the Tribunal has not at all considered the assessee's contention that when the Income-tax Officer had given a finding of fact that the assessee did not seem to have commenced the production as yet, there was no justification for treating the credits in the assessee's books in the form of Rs.90,000/- worth for shares issued and Rs.1,60,127/- in the form of unsecured loans as income under Section 68 of the Act. Similarly, the CIT (Appeals) erred in merely modifying the amount and in not deleting the entire additions.

Mr Shah for the assessee heavily relied on the decision of the Apex Court in CIT vs. Bharat Engineering and Construction Co., (1972) 83 ITR 187 in support of his contention when the assessee had not yet commenced the production, the cash credit entries ought to have been taken as capital receipts and ought not to have been treated as income.

5. On the other hand, Mr Akil Kureshi, learned counsel for the revenue has submitted that the Tribunal has confirmed the finding of fact given by the lower authorities that the entries in the assessee's books of accounts were not explained inspite of the opportunities given to the assessee and that when there were no other surrounding circumstances on record, no conclusion other than the one arrived by the Tribunal was possible even after applying the test laid down by the Apex Court in Noorjahan's case (Supra).

6. It is relevant to note that the Income-tax Act, 1922 did not contain any provision corresponding to the provisions of Sections 68 and 69 contained in the Income-tax Act, 1961. K.S. Kannan Kunhi vs. CIT, 72 ITR 757 was a case under the Income-tax Act, 1922. In that case, the Kerala High Court held that even if the explanation given by the assessee about cash credit entries was not found to be acceptable, the Assessing Officer is still required to consider whether the amounts constituted income of the assessee in the relevant year. In the facts of that case, the Court held that the assessee had no known source of income nor had indulged in any activity of an income earning nature in the accounting year and, therefore, the amounts in question could not be treated as income of that year.

7. Roshan Di Hatti vs CIT, Delhi (1977) 107 ITR 938 was also a case under the 1922 Act. The HUF assessee in that case was carrying on business in Lahore till June, 1947. In June, 1947, its karta transferred from Lahore certain sums to banks in New Delhi. The karta thereafter left Lahore for India with a sealed trunk containing gold ornaments, jewellery and cash which he deposited with a Bank at Amritsar. Though initially the karta had gone to Mussoorie, he shifted to Delhi in October, 1947 and started the gold business at Delhi in February, 1948. The first entry in the books of account of the assessee was dated 30.3.1948 bringing in an aggregate capital of certain amounts including gold ornaments and bank and cash balances. When asked to explain the source of the capital brought into the business, the assessee explained that the gold ornaments and cash were brought at the time of migration from Lahore and that from June, 1947 till March, 1948, the HUF assessee or its karta had no other business or means of income from which the assets in question could be earned. The Assessing Officer, the Appellate Assistant Commissioner as well as the Income-tax Appellate Tribunal and also the High Court held that there was material on the basis of which it was possible to conclude that a substantial amount in question represented the undisclosed income of the assessee. On appeal, the Supreme Court reversed the finding and held that though it was a finding of fact, the finding given by the Tribunal was such that no person acting judicially or properly instructed as to the relevant law could come to such a finding. The business carried on by the assessee at Lahore was reasonably large business though its extent could not be verified by any reliable material produced by the assessee. Therefore utter improbability amounting almost to impossibility of the assessee having earned such a large amount as profit within a few months in the disturbed conditions which were then prevailing in India was a circumstance which ought to have been taken into account by the Tribunal. In the said decision, the Apex Court reiterated the principle that the onus of proving the source of a sum of money found to have been received by an assessee is on him. If he disputes the liability for tax, it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation under the provisions of the Act. In the absence of such proof, the revenue is entitled to treat it as taxable income. To put it differently, where the nature and source of a receipt, whether it be of money or of other property, cannot be satisfactorily explained by the assessee, it is open to the revenue to hold that it is the income of the assessee

and no further burden lies on the revenue to show that that income is from any particular source.

8. In Noorjahan's case (Supra), the provisions of Section 69 of the Act came up for interpretation and after examining the provisions of the draft Bill and the report of the Select Committee, the Apex Court held that the intention of the Parliament in enacting Section 69 was to confer a discretion on the Income-tax Officer in the matter of treating the source of investment which has not been satisfactorily explained by the assessee as the income of the assessee and the Income-tax Officer is not obliged to treat such source of investment as income in every case where the explanation offered by the assessee is found to be not satisfactory. The question whether the source of the investment should be treated as income or not under Section 69 has to be considered in light of the facts of each case. In Sampath Iyengar's Law of Income Tax (9th Edition 1996) Page 3552, it is pointed out that in Section 68 of the draft Bill also, the expression "shall" occurring at two places was replaced by the word "may" at the instance of the Select Committee in order to confer discretion on the Assessing Officer to consider all the circumstances and to decide whether or not to treat the cash credits in question as income.

9. Coming to the order of the Tribunal in the instant case, all that the Tribunal has stated on this question is as under :-

> "We entirely agree with the submissions made on behalf of the revenue that the decision in the case of Kannan Kunhi has no application as it was rendered under the provisions of the Indian Income-tax Act, 1922 where a section corresponding to section 68 of the Act, was not there. In fact, this aspect of the matter has been considered in the case of Anup Udyog (supra), with which we are in respectful agreement. In this view of the matter and after considering the material, we do not find any merit in the appeal preferred by the assessee."

The Tribunal thus proceeded only on the basis that Kannan Kunhi's case (Supra) had no application as it was rendered under the provisions of the Indian Income-tax Act, 1922 which did not contain a section corresponding to Section 68 of the 1961 Act. The Tribunal obviously did not have the benefit of applying the law laid down by the Apex Court in Noorjahan's case (Supra). As per the said principle, the question was

required to be considered in the facts of the case, but the above extracted paragraph of the Tribunal's judgment shows that the Tribunal did not deal with the facts of the case except stating that "after considering the material". The Tribunal does not appear to have considered the submission made on behalf of the assessee that even as per the finding of the Income-tax Officer, the business of the assessee had not commenced. Similarly, the contention urged on behalf of the assessee is that even if the explanation offered by the assessee for explaining the cash credit entries is not accepted, the submission that the entries in question should have been considered as capital receipts was also not considered.

10. In CIT vs. Bharat Engineering and Construction Co., (1972) 83 ITR 187, the assessee Company was an engineering construction Company which commenced its business in May, 1943, but there were several cash credit entries in the first year of its business aggregating to Rs.2.50 lacs. The Income-tax Officer called upon the assessee to explain those cash credit entries. The explanation given by the assessed was found to be false by the Income-tax Officer, the Appellate Assistant Commissioner and the Tribunal. But, the Tribunal felt that those cash credit entries could not represent the income or profits of the assessee as they were all made very soon after the Company commenced its activities. The Tribunal was of the view that in the very nature of things the assessee could not have earned such a huge amount as profits very soon after it commenced its activities. The Apex Court, therefore, inferred that it was reasonable to assume that those cash credit entries were capital receipts although for one reason or other the assessee had not come out with the true story as regards the person from whom it got those amounts. The Apex Court, therefore, did not disturb the finding of the Tribunal.

12. In the instant case, the Tribunal did not at all consider any of the aforesaid aspects. After considering the finding which weighed with the Tribunal in confirming the order of the CIT (Appeals), it appears that the Tribunal proceeded on the footing that since the assessee did not offer any explanation for cash credit entries, the amounts in question had to be treated as income under Section 68 of the Act. Since that approach is not in consonance with the law laid down by the Apex Court in Noorjahan's case (Supra), we are of the view that the matter is required to be remanded to the Tribunal for taking a fresh decision in the matter in accordance with

law after applying the test laid down by the Apex Court in CIT vs. Smt. PK Noorjahan, (1999) 237 ITR 570, Roshan Di Hatti vs CIT, Delhi (1977) 107 ITR 938 and CIT vs. Bharat Engineering and Construction Co., (1972) 83 ITR 187.

We accordingly do not answer the questions referred to us as the matter is remanded to the Tribunal.

The reference accordingly stands disposed of with no order as to costs.

(M.S. Shah, J.)

(D.A. Mehta, J.)

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